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Written Submission of the Center for Democracy & Technology to the Attorney General for Massachusetts

Hearing on Online Sexual Exploitation

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The Center for Democracy & Technology (CDT)¹ appreciates the opportunity to submit written comments in conjunction with today's hearing. Sexual exploitation and human trafficking are horrible crimes and we welcome the Attorney General's attention to the issue.

We understand that the Attorney General is particularly concerned about the fact that advertisements for prostitution and child sex trafficking have appeared online on sites such as Craigslist. The focus of our comments today is to provide a context for the Attorney General's consideration of the issue of online hosting of illegal third party content. We first describe how speech is hosted online, and then explain the longstanding statutory protections from liability afforded to online "intermediaries" such as Craigslist for content posted by others and the importance of those legal protections to innovation and freedom of speech.

The term "online intermediary" encompasses conduits (such as ISPs) and platforms (such as social networks and video sharing sites) that allow users to post and access online content and communicate with one another. In 1996, Congress enacted broad and strong protection for intermediaries from efforts to impose liability on them for content posted by others, or to otherwise force them to screen or police the content their users posted online. This intermediary liability protection has been extraordinarily successful and is directly responsible for the explosive and innovative growth of online services that the United States has experienced over the past few decades. By protecting online providers from intermediary liability, Congress enabled a huge range of innovative new websites to offer social networking, video sharing, and other "Web 2.0" services that have transformed how we do business and socialize online.

Stepping back from such protections and imposing legal obligations on service providers to police online content – even in the effort to fight sexual exploitation and human trafficking – would have serious and harmful implications both for free speech online and for innovation and competition in online services. We urge the Attorney General to recognize these factors when considering how best to respond to the crimes of sexual exploitation and human trafficking.

¹ The Center for Democracy & Technology is a non-profit public interest organization dedicated to keeping the Internet open, innovative and free. CDT has offices in Washington, D.C., and San Francisco.

Protection for Online Intermediaries

Possible changes to the current legal framework surrounding online intermediaries have been suggested, contemplating requirements on online service providers to control content related to human trafficking and sexual exploitation. When assessing such proposals, it is critical to understand the broader context of the strong intermediary liability protection that has marked the United States' approach to online content since the early days of the commercial Internet. This protection has played an essential part in supporting the innovation and growth that we have experienced in online services. The fight against human trafficking and sexual exploitation, targeting both the online and offline components of these crimes, is unquestionably important. We urge the Attorney General to carefully consider the significant societal benefits that online intermediary liability protections have made possible, as well as the important role the Internet can play as a tool for law enforcement to pursue these cases, and not to go down the path of seeking to impose liability or responsibility for content on intermediaries.

The Need for Strong Protections for Intermediaries

The global Internet has become a vibrant and essential platform for economic activity, human development, and civic engagement. Every day, millions of journalists, educators, students, business people, politicians, and ordinary citizens go online to speak, access information, and participate in nearly all aspects of public and private life.

Internet service providers (ISPs), websites, online services, and a range of other technology companies act as conduits and platforms for speech. These “intermediaries” play critical roles in getting information and ideas from one corner of the online world to another, and they provide valuable forums for speech, from the political to the mundane – forums that are open, up-to-the-minute, and often free of charge.

The openness of these forums means, of course, that some users will post content or engage in activity that is offensive or even unlawful. In addition to cases where users post content that advertises illegal activity, as is alleged to occur on Craigslist, liability for online content could arise in instances of defamation, obscenity, invasion of privacy, or intellectual property infringement, among other things. This reality raises important policy questions that have an impact on the growth of the online environment: Specifically, should technological intermediaries such as ISPs and online services be held liable for or be responsible to police content posted by their users and other third parties? Or should that liability rest solely with the creator and poster of the content?

The answer in the United States has been to protect intermediaries from responsibility to police content posted by users.² While users themselves should undoubtedly remain responsible for their unlawful online activities, policies protecting intermediaries from liability for content posted by third parties expand the space for expression and innovation and promote the Internet as a platform for a wide range of beneficial activities. The history of the Internet to date shows that providing broad protections for intermediaries against liability is vital to the continued robust development of the Internet.

² In appropriate cases and pursuant to lawful process, intermediaries do continue to be required to respond to law enforcement subpoenas concerning online speakers who post illegal content.

The Internet developed and flourished because of an early U.S. policy framework based on competition, openness, innovation, and trust. This framework places power in the hands not of centralized gatekeepers, but rather of the users and innovators at the edges of the network. Importantly, this approach provides broad protections from liability for ISPs, web hosts, and other technological intermediaries for unlawful content transmitted over or uploaded to their services by third parties (such as users).

It is vital to understand the reasons why intermediary liability protection is so important for free speech on the Internet. When intermediaries are liable or responsible for the content created by others, they will strive to reduce their liability risk. In doing so, they are likely to overcompensate, blocking even lawful content. In this way, imposing liability on online intermediaries chills expression online and transforms technological intermediaries into content gatekeepers.

Indeed, holding intermediaries broadly liable for user content greatly chills their willingness or ability to host *any* content created by others. Liability creates strong incentives to screen user content before it is posted online, creating an indirect prior restraint on speech and inevitably leading to less user-generated content overall. In some instances, entire platforms for expression simply could not exist because the sheer volume of content uploaded to their services would make it impossible or economically unviable for the company to screen all user-generated content. As one example, users post over twenty-four hours of video to YouTube every minute.³ If liability concerns or an obligation to keep certain videos off of the service compelled YouTube to examine each video before allowing it to be posted online, YouTube could not continue to operate as an open forum for user expression. The same is true of Craigslist, where “users self-publish more than 30 million new classified ads each month,”⁴ Facebook, where users share 30 *billion* pieces of content every month,⁵ and countless other forums and blogs across the Web where users post their own content and hundreds or thousands of comments every hour.

Intermediary liability also creates another problematic incentive: Intermediaries will tend to over-block content and self-censor, especially where the legality of particular content is unclear or difficult to determine. In the face of threatened liability or policing responsibility, intermediaries will err on the side of caution in deciding what may be allowed. This incentive is especially strong (and can cause particular damage) when intermediaries are not able to easily determine if the content is unlawful on its face.⁶

³ Ryan Junee, “Zoinks! 20 Hours of Video Uploaded Every Minute!”, Broadcasting Ourselves ;), May 20, 2009, http://youtube-global.blogspot.com/2009/05/zoinks-20-hours-of-video-uploaded-every_20.html. Representatives of Google have recently stated that the current figure is 24 hours of video posted every minute.

⁴ Craigslist Factsheet, <http://www.craigslist.org/about/pr/factsheet> (last accessed September 13, 2010).

⁵ Facebook + Media, <http://www.facebook.com/media> (last accessed September 14, 2010).

⁶ For example, while a private party may allege that certain content is defamatory or infringes copyright, such determinations are usually made by judges and can involve factual inquiry and careful balancing of competing interests and factors. ISPs and online service providers are not well positioned to make these types of determinations.

In 1996, to address these concerns, Congress took strong action to insulate online intermediaries from liability. As part of the Telecommunications Act of 1996, Congress enacted Section 230 of the Communications Act.⁷ Now known simply as “Section 230,” the statute advances three policy goals: 1) to promote the continued rapid and innovative development of the Internet and other interactive media; 2) to remove disincentives to voluntary self-screening of content by service providers; and 3) to promote the development of tools (like filters) that maximize user control over what information the user receives online.

To advance its first goal, Section 230 gives intermediaries⁸ strong protection against liability for content created by third-party users.⁹ Section 230 has been used by interactive online services as a shield against a variety of claims, including negligence, fraud, defamation, violations of federal civil rights laws, and violations of state criminal laws.¹⁰

It is precisely these protections that led to the dramatic growth of social networking and other interactive, user-generated content sites that have become vibrant platforms for expression in the U.S. and all over the world. It is no surprise that almost all “Web 2.0” innovation online has taken place in the U.S., which has the strongest protections for intermediaries. Without Section 230, entry barriers for new Internet services and applications that allow user-generated content would be much higher, dampening the innovation we have seen in interactive media. The threat of liability would also tend to close the market to start-ups, which are often unable to afford expensive compliance staffs (thereby entrenching existing market players).

Importantly, in pursuit of Section 230’s second goal, the statute enables intermediaries, if they choose, to voluntarily remove content posted on their sites that is unlawful or otherwise offensive, without fear of liability. Under § 230(c)(2)(a), intermediaries can block or take down content they believe is inappropriate, without fear of liability to the poster of the content.

Among Web 2.0 sites and services, the primary means these sites have to respond to inappropriate content is a button or content flagging system that allows users to report abusive, illegal, and offensive content. The major user-generated content sites, including YouTube, Facebook, and Craigslist, provide robust terms of service that specify the types of content not permitted on their sites – which include human trafficking

⁷ 47 U.S.C. § 230. In addition to Section 230, Congress has also protected intermediaries through Section 512 of the Digital Millennium Copyright Act, 17 U.S.C. § 512, which protects intermediaries from liability so long as they afford copyright holders a means to have copyright violations taken down. Beyond the statutory bases for liability protection, there are strong arguments that the First Amendment would require such protection in at least some contexts.

⁸ Section 230 calls these intermediaries “interactive computer services.” 47 U.S.C. § 230(c)(1).

⁹ The statute provides: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1).

¹⁰ See, e.g., Center for Democracy & Technology, “CDT Joins Briefs Urging Courts to Properly Apply § 230 of the CDA,” Policy Post 14.4, March 31, 2008, <http://www.cdt.org/policy/cdt-joins-briefs-urging-courts-properly-apply-section-230-cda>. See also Electronic Frontier Foundation, “Section 230 Protections,” Bloggers’ Legal Guide, <http://www.eff.org/issues/bloggers/legal/liability/230>.

and activity related to sexual exploitation – and give users the ability to report content that violates the site’s terms.

Thus, for example, most leading social networks and video sharing sites have rules against sexually explicit material, and they routinely remove even legal content if it violates their terms of service. These self-regulatory efforts illustrate how a policy of protecting intermediaries from liability is compatible with – and can even help serve – other societal interests. Although relying on voluntary enforcement of terms of service will not lead to the complete removal of sexually exploitive content from the Internet, it will make such content less available, and will do so in a manner that is consistent with both the First Amendment and the statutory regime of intermediary protection.

Protection for intermediaries has been a key foundation for the success of the Internet. A decision to undermine that foundation, and to seek to impose responsibility on online intermediaries for user-generated content would threaten the continued growth and innovation that has been the hallmark of the Internet.

Conclusion

CDT would like to thank the Attorney General for holding this important hearing to discuss the problem of sexual exploitation and human trafficking, and for considering these comments on the legal and policy framework that supports intermediary liability protections in the United States. We appreciate the opportunity to submit our comments today and we look forward to working with the Attorney General on these issues.

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